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MINUTES
FRIDAY – MARCH 26, 2004

Call to Order

The Board of Environmental Review's regularly scheduled meeting was called to order by Chairman Russell at 9:05 a.m., on Friday, March 26, 2004, in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana.

Attendance

Board Members Present: Chairman Joseph Russell, Ward Shanahan, and Dr. Garon Smith
Via Teleconference: Kim Lacey, Susan Kirby Brooke and David Fishbaugh

Board Members Absent: Russ Hudson

Board Attorneys Present: Tom Bowe and Kelly O'Sullivan, Attorney General's Office,
Department of Justice

Board Secretary Present: Joyce Wittenberg

Court Reporter Present: Laurie Crutcher

Department Personnel Present: Jan Sensibaugh, Director (DIR); Tom Livers, Deputy Director (DIR); Jamesa Dodd, DIR; John North, Chief Legal Counsel, Legal Unit (Legal), DIR; Jim Madden, Legal, DIR; Ed Hayes, Legal, DIR; Claudia Massman, Legal, DIR; Norman Mullen, Legal, DIR; Keith Christie, Legal, DIR; John Arrigo, Administrator, Enforcement Division; Art Compton, Administrator, Planning, Prevention & Assistance Division (PPAD); Christian Levine, Water Quality Planning Bureau (WQPB), PPAD; Bob Bukantis, WQPB, PPAD; Steve Welch, Administrator, Permitting & Compliance Division (PCD); Don Vidrine, Chief, Air Resources Management Bureau (ARMB), PCD; Jan Brown, ARMB, PCD; Charles Homer, ARMB, PCD; Dave Klemp, ARMB, PCD; Ed Thamke, Chief, Waste & Underground Tank Management Bureau (WUTMB), PCD; Bill Rule, WUTMB, PCD; Rick Thompson, WUTMB, PCD; Neil Harrington, Chief, Industrial & Energy Minerals Bureau, PCD; Bonnie Lovelace, Chief, Water Protection Bureau, PCD; Jenny Chambers, Public Water Supply & Subdivisions Bureau, PCD; Sandi Olsen, Administrator, Remediation Division (RD); David Bowers, Hazardous Waste Site Cleanup Bureau, RD.

Interested Persons Present (*Disclaimer: Names are spelled as best they can be read from the official sign-in sheet.*): J. Chris Pfahl, ASARCO, Inc.; L.R. Shoenberger, Conoco Phillips; Don Allen, Western Environmental Trade Association (WETA); Bob Montgomery, Western Energy Company; Dave Simpson, Westmoreland Coal Company; Gary Amestoy, Amestoy Consulting; Erin Inman, Browning, Kaleczyc, Berry & Hoven; Gail Abercrombie, Montana Petroleum Association; Doug Dodge, Town Pump, Inc.; Jim Mockler, Montana Coal Council

I. ADMINISTRATIVE AGENDA ITEMS

- A. Review and approve minutes of the January 30, 2004 meeting.

Dr. Smith MOVED to have the January 30, 2004, minutes approved. Ms. Lacey SECONDED the motion. The motion CARRIED with a unanimous VOTE.

II. BRIEFING AGENDA ITEMS

- A. CONTESTED CASE UPDATE:

1. Cases assigned to Hearing Officer Tom Bowe

- a. In the matter of M&W Investments, Inc. appeal of two subdivision application non-degradation decisions and a deviation request denial (EQ #01-1457 and #00-1822).

Mr. Bowe said water quality monitoring is supposed to be ongoing and that, with additional data, the parties hope to meet with him in late October and schedule further proceedings if necessary.

- b. In the matter of CR Kendall Corporation's (BER 2002-09 MM) request for a hearing to appeal DEQ's decision to deny a minor permit amendment, under the Metal Mine Reclamation Act.

Mr. Bowe explained that the parties had repeatedly agreed to delay contested case proceedings and that he had granted those requests.

- c. In the matter of violations of the Montana Underground Storage Tank Act at the Former Husky Station, 13 N. Highway Avenue, Fromberg, Montana (Facility ID #05-11777, FID #645) (BER 2003-12 UST).

Mr. Bowe informed the Board that the parties have asked him to change and extend some of the intermediate deadlines. He said this often is a sign of the case schedule being changed or the case being resolved.

- d. In the matter of violations of the Montana Underground Storage Tank Act at Helmet of Salvation Shelter (Facility ID #34-13180, FID #724) (BER 2003-13 UST).

Mr. Bowe said he was informed by counsel there may be a settlement presented to him, but since he had not yet received it he would continue to have the hearing date of mid-July on his calendar.

- e. In the matter of the Petition for Review of Hazardous Waste Final Permit No. MTHWP-03-01 issued to Flying J Petroleums, Inc., (BER 2003-14 HW).

Mr. Bowe informed the Board that the parties had stipulated to a stay, requesting the deadlines be delayed until mid-June. Mr. Bowe had granted the stay.

- f. In the matter of the request for hearing of Four Corners Community Foundation on the amendment of Permit No. SIM-001 issued to Dennis Simpson, Gallatin County (BER 2003-15 OC).

Mr. Bowe had nothing to add to the information given on the agenda.

g. In the matter of the Maximum Achievable Control Technology approval for Air Quality Permit No. 3182-00, for the Roundup Power Project (BER 2003-17 AQ).

Mr. Bowe had nothing to add to the information provided on the agenda.

B. OTHER BRIEFING ITEMS

1. Update – Upper Blackfoot Mining Complex

Mr. Livers said Mr. Bowers had prepared some talking points, which were distributed to the Board members.

Mr. Bowers explained that the Board, in September 2003, had set this date to review progress on work as outlined in the implementation plan. He said there were several key issues to be examined: 1) the Blackfoot River and its headwaters were not in any worse nor any better condition than when the petition for standards was first granted; 2) ASARCO had missed critical deadlines outlined in the implementation plan that jeopardize remedial actions planned in 2004 for the upper/middle Mike Horse area; and 3) what could be done to ensure that work will be done to satisfy the requirements of the implementation plan.

Mr. Bowers provided a brief overview of the Upper Blackfoot Mining Complex. The mines in the district are mostly silver and lead mines that operated sporadically from the late 19th century through the 1960s. The Mike Horse Mine was the flagship and one of the known main sources of pollution impacting the area covered under the temporary water quality standards implementation plan. He said a tailings impoundment was included with the mine.

Mr. Bowers explained that ASARCO, with the assistance of ARCO, implemented voluntary interim remedial actions without formal DEQ approval in the 1990s in an attempt to address critical sources of contamination related to the various mines in the Upper Blackfoot.

Mr. Bowers said the temporary water quality for the Upper Blackfoot implemented in 2000 included annual surface water monitoring required for Mike Horse Creek, Beartrap Creek, and the Upper Blackfoot River. He said other sampling required under the standards included ground water, macroinvertebrate populations in the streams, stream sediments, and seeps associated with tailings impoundments and other suspected sources of contamination.

Mr. Bowers informed the Board that no remedial actions had been implemented since the petition for the standards was approved. He said the submittal of an engineering work plan for ASARCO's planned removal of the Upper Mike Horse waste piles in the 2004 work season was still forthcoming. He said ASARCO submitted the 2003 monitoring report at the end of February 2004, 1.5 months beyond the deadline. He said it included data demonstrating for the most part that concentrations related to the flow events were stable.

Mr. Bowers explained that the tables given to the Board show data from monitoring events over the past few years. He provided further explanation of the tables. Mr. Bowers said the temporary standards were well above the WQB-7 standards.

Mr. Bowers said that remedial actions were needed if the implementation plan was to be successful and meet the 2010 deadline. He said there were a number of other things in the 2003 monitoring report that were lacking: 1) an investigation of seeps emanating from the Mike Horse repository was not performed as per the 2003 work plan, and no explanation was provided; and 2) macroinvertebrate sampling was done, but it was reduced from three stations to two stations and, again, no explanation was provided for the reduction in stations.

Mr. Bowers informed the Board that ASARCO submitted the 2004 work plan on March 5; the deadline for submittal was January 31. He said the Upper Mike Horse waste pile removal work plan was also pending, almost one month past due.

Mr. Bowers said that to get things back on track and ensure that cleanup takes place as scheduled in 2004: 1) ASARCO is required to submit a draft engineering work plan by May 3, 2004; 2) DEQ will supply comments on the draft work plan to ASARCO by June 2, 2004; and 3) ASARCO must satisfactorily address DEQ's comments in a revised plan by July 2, 2004. He said that, upon DEQ's approval of the work plan, ASARCO must submit a timeline that includes obtaining applicable permits for removal work to be done in 2004.

Mr. Bowers provided a summary of the concerns of DEQ: 1) the submittal dates were not met; 2) deviations from the approved work plans were not submitted for approval; 3) the 2003 monitoring report did not include discussion of data analysis; and 4) annual federal trust allocations to ASARCO for the Upper Blackfoot may be insufficient to complete the Upper and Middle Mike Horse cleanup slated for 2004.

Mr. Bowers provided a brief summary of DEQ's expectations: 1) ASARCO will meet the deadlines; 2) ASARCO will submit a 2005 engineering work plan for the cleanup of the Lower Mike Horse waste piles located on Forest Service property, and that the plan shall meet temporary standards and include the scope of any remaining work required for the previous year's cleanup of the Upper and Middle Mike Horse waste piles.

Mr. Shanahan initiated discussion regarding the data in the tables. Mr. Bowers explained that the copper level for the Blackfoot River was about three times higher than the Clean Water Act standards.

Ms. Brooke commented that the cavalier approach toward deadlines and deviations from the work plan was alarming.

Mr. Pfahl provided a chronology of what ASARCO had done at the Upper Blackfoot Mine. He said ASARCO and ARCO began doing reclamation work on properties owned by ASARCO in 1993 and that they had spent in excess of \$10 million at this site. He said that the temporary standards were approved in 1999, that a schedule was attached to the temporary standards, and that ASARCO had been following that schedule and it plans to continue to follow that schedule.

Mr. Pfahl explained that some of the scheduling issues were driven by the Forest Service. He said that ASARCO had no control over how quickly the Forest Service responded to their submittals, and that ASARCO was under an AOC with the Forest Service to address the mine wastes on public land and the tailings impoundment.

Mr. Pfahl said that part of the problem with missing deadlines was that they were unrealistic by about thirty days. He said that ASARCO thinks it has done an excellent job of cleaning up the site.

Mr. Pfahl responded to Mr. Shanahan's question regarding the copper level in the Blackfoot River, saying that the sample location was downstream of the main Heddleston ore body. He said there was approximately 100 million tons of near-surface copper ore sitting there, which they thought had a significant impact on the water quality. He asked that the Board allow ASARCO to continue operating under the schedule to which they had agreed. He also explained that funding from the trust fund for this year would not come until June, which caused some of the delay in getting the final engineering documents prepared.

Ms. Brooke commented that the explanation was unacceptable. She said when deadlines can't be met plans need to be made with the DEQ to adjust the deadlines so they are realistic; deadlines shouldn't just be ignored. She also questioned the deviations from the work plan without checking with the DEQ.

Mr. Pfahl said that ASARCO would have no problem meeting the May date for engineering plan submittal.

Mr. Shanahan concurred with Ms. Brooke and added that it appeared to be a communication problem and that ASARCO needed to keep in touch with DEQ staff.

Chairman Russell questioned why ASARCO was waiting for the trust fund money when they have their own resources and are willing to commit some to it. He said the Board chastised the Forest Service last year for their scheduling and how fast they were moving on this, and stated that this needs to get moving.

Dr. Smith told Mr. Pfahl that from his testimony it sounds like ASARCO is trying to meet its responsibilities in the cleanup, but that if they have a legitimate reason, it would really help if they formally requested an extension.

A brief discussion was held regarding the Board visiting the site at the July meeting.

Chairman Russell asked if there were any members from the public that wished to speak to the issue. No one responded.

III. ACTION AGENDA ITEMS

A. REPEAL, AMENDMENT OR ADOPTION OF FINAL RULES:

1. In the matter of the amendment of ARM 17.30.502, 17.30.615, 17.30.619, 17.30.651, 17.30.653, 17.30.656, 17.30.657, 17.30.702, 17.30.715, 17.30.1001, 17.30.1006, and 17.30.1007 pertaining to water use classifications and department Circular WQB-7.

Mr. Levine said the Department brought a proposal before the Board in 2002 for a group of nine new classifications, rulemaking was initiated, and the Board adopted those standards and classifications in August 2003. He said the EPA reviewed them after they were adopted and found that the level of protection for aquatic life for four of the classifications was not high enough.

Mr. Levine informed the Board that a public hearing was held January 16, 2004. The Board packet included comments made at the hearing, and were included along with the responses to those comments. He summarized the comments received and the responses provided. He also clarified that the modifications proposed were just enough to comply with EPA requirements.

Mr. Allen was the only member of the public to make oral comment at this time and expressed concern about the expense of conducting a Use Attainability Analysis.

Mr. Shanahan MOVED to amend the rules and to adopt the Presiding Officer's Report, the DEQ's Responses to Comments, and the 521 and 311 analyses. Dr. Smith SECONDED the motion. Dr. Smith said that the DEQ had written good responses to the public comments. The motion CARRIED with a unanimous VOTE.

2. In the matter of the amendment of ARM 17.8.102, 17.8.103, 17.8.106, 17.8.130, 17.8.316, 17.8.320, 17.8.340, 17.8.401, 17.8.801, 17.8.819, 17.8.822, 17.8.1201, 17.8.1204 pertaining to incorporation by reference of current federal regulations and other materials into air quality rules.

Mr. Homer explained that on January 21, the presiding officer held a hearing to take comment on the annual update of the federal statutes that are incorporated by reference in the Administrative Rules of Montana. He said there were no comments at the hearing, other than that of the DEQ urging adoption of the changes.

Chairman Russell asked if any member of the public would like to speak to the matter. No one responded.

Dr. Smith MOVED to amend the rules and to adopt the Presiding Officer's Report and the 521 and 311 analyses. Mr. Shanahan SECONDED the motion. The motion CARRIED with a unanimous VOTE.

B. INITIATION OF RULEMAKING AND APPOINTMENT OF HEARING OFFICER:

1. Amend the rules governing the Montana Strip and Underground Mine Reclamation Act (MSUMRA) at ARM 17.24.301 through 17.24.1301 to address changes in MSUMRA passed by the State Legislature in 2003, to update, revise, and clarify a variety of rules, and to address changes in the federal (OSM) rules.

Mr. Harrington said the proposed rule amendments involved changes to the Montana Strip and Underground Mine Reclamation Act passed by both the 2001 and 2003 State Legislatures, changes required by the Federal Office of Surface Mining, some more recent changes in the federal regulations, and a wide range of clarifications, corrections and streamlining of regulations. He said there were also proposed changes to remove some requirements that DEQ believed to be unnecessary.

Mr. Harrington provided some history on the rulemaking and said it was a significantly collaborative effort. He also requested that if the Board approves the initiation, the program have permission to make a few minor, mostly grammatical changes. He explained that DEQ had also identified some additional rules that needed to be added for cross-referencing purposes.

Discussion took place regarding the changes requested and the frequency of quoting the MCA.

Chairman Russell asked if anyone else wanted to speak to the matter.

Mr. Mockler said the Coal Council did not fully agree with the rules, but that it was in favor of moving forward and would save its comments for the comment period.

No other member of the public responded.

Mr. Shanahan MOVED to initiate rulemaking and to grant the Chairman permission to sign the notice after verifying that the changes were not substantive. Dr. Smith SECONDED the motion. The motion CARRIED with a unanimous VOTE.

Discussion commenced regarding the date of the hearing and the presiding officer's name being excluded from the notice.

Mr. Shanahan MOVED to appoint Mr. Bowe as the presiding officer and to give him the authority to set the schedule. Ms. Lacey SECONDED the motion. The motion CARRIED with a unanimous VOTE.

2. Amend the Solid Waste Fee Rules at ARM 17.50.400 to correct an oversight in the fee tables on the recently adopted Solid Waste Fee rules.

Mr. Thompson said the Department was requesting the Board approve initiation of rulemaking to correct an oversight in the recently adopted Solid Waste Fee Rules and explained what the oversight was.

Mr. Bowe said the rulemaking was not considered of significant interest to the public. He suggested it might be appropriate for the Board to specify that if it becomes necessary to hold a hearing he would be the presiding officer and would have the authority to set the schedule.

No member of the public responded to the Chairman's request for comments.

Mr. Shanahan MOVED to proceed with the rulemaking and to appoint Mr. Bowe presiding officer and to give him authority to set a schedule if a hearing becomes necessary. Mr. Fishbaugh SECONDED the motion. The motion CARRIED with a unanimous VOTE.

C. FINAL ACTION ON APPEALS:

1. In the matter of applicant Town of Geraldine's Montana Pollutant Discharge Elimination System Permit (MPDES) No. MT-002-0826.

Mr. Bowe explained that Ms. O'Sullivan had been the hearing examiner for this case, but had been called away from this Board meeting. He said the parties had reached a stipulation and that an explanation of the stipulation was included in the Board packets.

Ms. Lacey MOVED that the Board authorize the Chairman to sign the order to dismiss the case. Mr. Fishbaugh SECONDED the motion. The motion CARRIED with a unanimous VOTE.

2. In the matter of the request for hearing of Margrit Matter (BER 2003-10 SUB) under Mont. Code Ann. Sec. 76-4-126(1).

Chairman Russell reminded the Board that he had recused himself from this case and asked Dr. Smith to preside.

Mr. Bowe said this was one of Ms. O'Sullivan's cases and that she recommends the matter be dismissed with prejudice in accordance with the stipulation of the attorneys for the parties.

Mr. Shanahan MOVED to accept the hearing examiner's recommendation and to authorize the Acting Chairman to sign the order. Mr. Fishbaugh SECONDED the motion. The motion CARRIED with a unanimous VOTE.

3. In the matter of violations of the Water Treatment Plant Operators Laws by Danny L. Holbrook, 111 Jack Street, Billings, Yellowstone County, Montana, Operator License #3808 (FID #682) (BER 2003-18 WTPO).

Mr. Bowe explained that Ms. O'Sullivan was the hearing examiner for this case. He said the parties had reached a settlement and the Board needed to decide whether to order the dismissal of the case, since the parties had resolved their dispute.

Mr. Shanahan MOVED to accept the hearing examiner's recommendation and authorize the Chairman to sign the order. Dr. Smith SECONDED the motion. The motion CARRIED with a unanimous VOTE.

D. NEW CONTESTED CASE APPEALS:

Mr. Bowe explained there had been eight new contested cases since the last Board meeting. Discussion took place regarding the nature of the cases.

Mr. Shanahan made a JOINT MOTION to appoint Mr. Bowe hearing examiner in Nos. 1, 2, 4, 5, 6, 7 and 8, to appoint Ms. O'Sullivan in No. 3, as listed on the agenda, and to allow Mr. Bowe to set the schedules in Nos. 5 and 6. Mr. Fishbaugh SECONDED the motion. The motion CARRIED with a unanimous VOTE.

1. In the Matter of Violations of the Montana Asbestos Control Act, IIC, Inc., Bozeman, Billings and Colstrip, MT (BER 2004-01 ASB).

2. In the Matter of Violations of the Water Quality Act by Golden Jubilee Mining Inc., Philipsburg, MT (BER 2004-02 WQ).

3. In the Matter of Violations of the Montana Underground Storage Tank Act at Cam-Am Convenience Store, Plentywood, MT (BER 2004-03 UST).

4. In the Matter of Violations of the Montana Underground Storage Tank Act at Browning Public School District #9, Browning, MT (BER 2004-04 UST).

5. In the Matter of Violations of the Montana Underground Storage Tank Act at Cameron Ranch, Power, MT (BER 2004-05 UST).

6. In the Matter of Violations of the Montana Underground Storage Tank Act at Highwood Service Center, Highwood, MT (BER 2004-06 UST).

7. In the Matter of Violations of the Montana Underground Storage Tank Act at Big Sky Truck Stop, Dillon, MT (BER 2004-07 UST).

8. In the Matter of the Appeal of Montana Golf Enterprises of the Fee Assessment for Groundwater Permit No. MTX000128 (BER 2004-08 WQ).

IV. GENERAL PUBLIC COMMENT

Chairman Russell asked if any member of the public would like to speak to any matter that was before the Board. No members of the public were present.

Chairman Russell mentioned an article he had read in the Helena Independent Record newspaper about a cancer cluster. He said that tumor registry was not being kept up to date. He said health care providers needed to submit cancer data and suggested the Department might want to look into this issue. The article was discussed further.

Mr. Livers reminded the Board of the meeting schedule for the summer and that the Upper Blackfoot Mining Complex tour was being planned for the July meeting.

V. ADJOURNMENT

Ms. Brooke MOVED to adjourn. Mr. Shanahan SECONDED the motion. The motion CARRIED with a unanimous VOTE. The meeting adjourned at 10:45a.m.

Board of Environmental Review March 26, 2004 Minutes Approved:

JOSEPH W. RUSSELL, M.P.H.
CHAIRMAN
BOARD OF ENVIRONMENTAL REVIEW

DATE